UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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ELEANOR McCULLEN, et al *
Plaintiffs, *
*
vs. * CIVIL ACTION
* No. 08-10066-JLT
MARTHA COAKLEY, *
Attorney General for the *
Commonwealth of Mass. *
Defendant. *
* * * * * * * * * * * * * * * * *

BEFORE THE HONORABLE JOSEPH L. TAURO
UNITED STATES DISTRICT JUDGE
DAY ONE
NONJURY TRIAL

A P P E A R A N C E S

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Courtroom No. 22
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May 28, 2008
10:05 a.m.

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P R O C E E D I N G S

THE CLERK: All rise for the Honorable Court.

THE COURT: Good morning, everybody.

COUNSEL: Good morning, Your Honor.

THE COURT: Sit down, please.

THE CLERK: This is Civil Action No. 08-10066, McCullen versus Coakley.

Would counsel please identify themselves for the record.

MR. DEPRIMO: Michael Deprimo for the plaintiff.

MR. THERIOT: Kevin Theriot for the plaintiff.

MR. MORAN: Philip Moran. Good morning, Your Honor.

THE COURT: Good morning.

MR. SALINGER: Good morning, Your Honor. Ken Salinger. I'm an Assistant Attorney General for the Commonwealth for the defendant.

THE COURT: Okay.

MS. TABOR: Anna-Marie Tabor also for the defendant.

THE COURT: Okay. I am standing because I have got a little sciatica. Maybe I told you this the last time I was here, and I still have it; but it is getting better, not that you care.

(Laughter.)

THE COURT: But I don't want you to be startled by me standing up every once in a while. It isn't like I am going to walk out of the room in protest or anything like that. So if I am standing, you will understand why.

I have read your briefs. They are very fine, professional job on both sides. And it is the kind of situation that I can say, well, you know, why don't I just take it under advisement on the record and on the briefs; but I want to give you an opportunity to embellish if you want to on your briefs.

You don't have to repeat; but if there are certain points that you want to bang home, this is the occasion for it. We have all the time that you want so don't feel that you have to be rushed or that you are imposing because you are not.

As I say, the briefs fine. And if you have any other assistance you want to present to me, then I will be very happy to have it.

So why don't we start with the plaintiffs.

MR. DEPRIMO: Thank you.

Good morning, Your Honor.

THE COURT: Good morning.

MR. DEPRIMO: May it please the Court, this case absolutely can be boiled down to one simple question:

Does the government have a significant interest in

banning from public streets and sidewalks welcomed and invited speech to willing listeners. To ask the question is actually --

THE COURT: Welcomed and invited?

MR. DEPRIMO: Welcomed and invited.

THE COURT: Do you know that it is welcome and do you know that it is invited?

MR. DEPRIMO: What I am simply saying, Your Honor, is that the statute as drafted captures welcome and invited speech to willing listeners as well as unwelcome and uninvited speech to unwilling listeners. It captures both.

THE COURT: I understand. Go ahead.

MR. DEPRIMO: Your Honor, this law is unprecedented. There are no federal, state or local laws that I am aware of anywhere in the country that even begin to approach a 35-foot fixed buffer zone on public sidewalks around abortion clinics.

The closest that I have seen is a 20-foot fixed buffer zone that was targeted at health care facilities that set forth a fixed buffer zone around the clinic entrances and driveways and entrances of health care facilities in West Palm Beach, Florida. That particular statute or ordinance was struck down by the Federal District Court sitting in West Palm Beach, Florida on the ground that it was -- it violated the time, time, place and manner test and

it was overbroad.

The court relied upon Hill v. Colorado, Madsen, Schenck, Frisby and Ward in making these conclusions.

The buffer zone here --

THE COURT: The Madsen case, help me out. That is the Supreme Court decision?

MR. DEPRIMO: Yes, the Madsen case --

THE COURT: And I thought they were involved with the 36-foot.

MR. DEPRIMO: Yes. The Madsen case --

THE COURT: Isn't that --

MR. DEPRIMO: That's correct.

THE COURT: So more than we are dealing with.

MR. DEPRIMO: Yes. But very distinguishable because the Madsen case dealt with an injunction. It wasn't a law of general application as this is here. And the law down in West Palm Beach, Florida was the law of general application.

In the Madsen case, what you had was a very egregious record of unlawful conduct. As a matter of fact, the Supreme Court characterized the factual record as extraordinary. You had up to 400 people who were blocking the streets, who were entering the clinic, who were trespassing on private property. People would lie in the driveway, kneel on the driveway, sit in the driveway so the

cars could not pass.

Any time there is a -- that the government seeks to restrict speech, you have to look at the facts that warrant the restriction. In other words, every particular case is different because it depends upon the particular facts.

So in Madsen the court found that a 36-foot fixed buffer directed at law breakers, specific individuals who are law breakers was needed in order to prevent future unlawful conduct.

The difference between an injunction and a law of general application is this:

A person who is enjoined is enjoined because in addition to engaging in speech activities, they have engaged in unlawful conduct. Essentially they forfeited some of their constitutional rights.

One can't complain that they're pushed back when, in fact, it's their own doing because they engaged in trespass or blocking, impeding or what have you.

A law of general application is very different because what a law of general application does when we're talking about restricted speech is it actually regulates speech that is lawful. And there is nothing in the record or at least with respect to the general public. Certainly many people have engaged in unlawful conduct.

So it would seem to me that there is a significant

difference between an injunction versus a law of general application.

Another thing that seems to me as well, Your Honor, is that if the 36-foot buffer in Madsen was pretty much the bright line as to what government can or cannot do, it seems to me there would be no reason for them to take the Schenck case which examined the 15-foot fixed buffer and the 15-foot floating buffer.

It also seemed to have been no reason for the court to accept cert in Hill v. Colorado which examined an 8-foot floating buffer within a fixed hundred feet of health care facilities.

THE COURT: Maybe we could assume that the center of interest is the floating buffer. In other words, that is what triggers the interest and the examination by the Supreme Court is the fact that you have a floating buffer and the arguments that are made about the floating buffer being more difficult to supervise and control and to be able to judge with certainty what it is that might make someone think that they are being accosted within that 15-foot buffer. And it may be somebody else that is right next to it instead.

MR. DEPRIMO: Yes. It seems to me --

THE COURT: Do you understand my question? Maybe it was a little --

MR. DEPRIMO: I think so. I think what you are saying is that maybe the court examined the floating buffer in Hill to determine whether or not it wasn't vague so that it was actually enforceable by --

THE COURT: Yes, because the floating buffer, the problem with the floating buffer -- I am not saying that this is controlling in this case -- but the problem with the floating buffer is that you never know if somebody is walking towards you -- you are probably, what, about ten feet away from me. Nobody would know for sure whether I am walking toward you or I am walking toward one of your colleagues. And how could we know?

And I think that it may be too simple to say that you are better off having a fixed boundary where everybody knows what the rules are and everybody is guided by that as opposed to this floating buffer. That sort of troubles me, the floating buffer.

MR. DEPRIMO: Right.

It seems to me in Hill, Your Honor, the way that the court analyzed the statute in Hill was they considered kind of a balancing test. They said okay, the interests the government is looking to protect is the unwanted approaches to unwilling listeners. And you have to balance the interests of these unwilling listeners against the First Amendment rights of speakers.

So the court waived that. And what the court found in Hill was that even though there was an eight-foot no approach zone, the fixed portion itself allowed free access. Anybody could walk in and out of that hundred foot zone. Anybody could stand anywhere within that fixed zone. They weren't required to retreat.

In other words, if I was standing here in the fixed zone and somebody were to walk toward me, there would be no duty on my part to have to step back. They could walk right next to me and I would have no duty to retreat.

The court found that what was significant in that case was the fact that leafleteers, for example, were able to stand right next to the door, right next to the path of pedestrians and they could hand, you know, hand out their literature. People who were walking by could easily reach out and accept them.

They also stated that people could speak from a conversational distance. I think those two things are actually very significant to the court in Hill.

In Schenck the floating buffer zone was struck down.

THE COURT: Just to pick up with this conversational tone, here we have as part of the record some evidence that, I take it it is the defendants had two people engaged in conversation 36 or 35 feet away. And the

evidence is that you could hear. Am I dreaming that or is that in the record?

MR. SALINGER: That's in the record, Your Honor. That took place before the legislative hearing, that's correct.

THE COURT: Okay. Good.

I always like to make sure that my memory is still sharp. Go ahead.

MR. DEPRIMO: Two problems with that, Your Honor.

One is that it took place in the building. It took place in a hearing room such as this. The ambient noise in a courtroom or in a hearing room where the Senate was meeting is very different than what you have out in the street.

There is no ambient noise here. The acoustics are good. My voice can be heard very clearly.

When you are out on the street, you are competing with cars, trucks, construction, trains, airplanes. And, of course, the human voice doesn't carry as far in the open air as does it in a place where you have got four walls.

THE COURT: You make a good point.

MR. DEPRIMO: Another thing that's very significant about that, Your Honor -- and I confess that in my briefing I mistook this as well -- is that the buffer zone in this case actually creates a buffer zone of a 35-foot radius from

any portion of a driveway, entrance or exit which means, for example -- and I'm going to show the Court this photograph here (indicating).

This (indicating) actually is a blowup of a photograph that's in the record. This is document 60-3. It's a photograph of the public sidewalk outside of Women's Health Center in Brookline.

The buffer zone in this case, or at least under the statute can extend from the driveway here (indicating) 35 feet. It encompasses the driveway. And then it extends an additional 35 feet in the other direction.

So you have got 35 feet here plus, say, fifteen feet of driveway plus an additional 35 feet. So the buffer zone here at Women's Health Center is not 35 feet. It is actually closer to 85 feet.

Now, the court in Schenck --

THE COURT: The line here goes across and everybody is barred from crossing that line in some effort to communicate; is that it?

MR. DEPRIMO: Yes. Let me make something a little clearer here, Your Honor. I'm going to show you another photograph.

This (indicating) is document 60-5. This is simply another view of Women's Health Center in Brookline.

There are actually two driveways that go in and out

of this particular clinic here. But you can see right here, this is the 35-foot buffer zone (indicating). So it is 35 feet from here (indicating) to the edge of the driveway, across the driveway and then an additional 35 feet down the sidewalk.

So no one, no one can enter into this zone here (indicating) and remain or stand. You can't leaflet. You can't engage in oral communication. You can't protest. You can't counsel. You can't display signs.

THE COURT: You can go only to the entrance?

MR. DEPRIMO: I'm sorry, Your Honor?

THE COURT: In other words, the limitation goes to the entrance. This is one line. This is the perimeter line, the -- what am I trying to say?

The bar on somebody like yourself who wants to pass out literature is in between this line and the entrance; is that what you are telling me?

MR. DEPRIMO: It's the entrance, the entrance to that --

THE COURT: It is not just this side and that side, it is also toward the entrance; right?

MR. DEPRIMO: I don't think so. Let me try to explain this, Judge, so I'm not exactly --

THE COURT: Well, how far is this line from the entrance?

MR. DEPRIMO: Well, it's not from the entrance. It is from the driveway. In this particular setting here, the abortion clinic is located in this (indicating) office building. So the entrance to the clinic is actually way over here (indicating).

I have never been out there so I'm not sure. I'm guessing it's probably 75 or 100 feet from the public sidewalk. I would say from here to there (indicating).

Where the buffer zone is, it is from the edge of the driveway 35 feet out the sidewalk. And then from the other edge of the driveway 35 feet out to the sidewalk. And then in a radius if it was marked -- and I don't know -- it's not marked in this photograph but I'm told it is actually marked there now -- but the radius would come out from both points out into the street.

Let me show you another photograph that might be of more help in that respect. This is document No. 65-8. This is also in the record. This is a copy or a photograph of the buffer zone outside of the clinic Planned Parenthood on Commonwealth Avenue in Brighton. Let me put it together with another document.

This (indicating) is document 65-11. And if you put these two together here, you can actually see how large the buffer zone is (indicating). The buffer zone encompasses the entire area within that yellow line.

THE COURT: Okay.

MR. DEPRIMO: And actually, Your Honor, there are two buffer zones under the statute. You have that 35-foot radius. And then in addition to that buffer zone there is also a rectangular buffer zone that goes from the doorway or the driveway in a direct line out to the street.

So in this particular setting here at Planned Parenthood, the actual entrance to the clinic is actually recessed about ten feet off the public sidewalk. You actually have to walk about ten feet down before you can open the door.

So from one point of the buffer zone to the other point of the buffer zone, it's actually about 50 feet across. So you're encompassing 50 feet of the public sidewalk.

The arc as you can see comes almost up to the curb (indicating) of the street. This is Commonwealth Avenue along here (indicating). And as the Court can see, as it goes around to Babcock (ph.) Street, it comes around, it actually encompasses a portion of Babcock Street.

Now, if you are not a clinic agent or a volunteer or an employee, you are not -- you can't go into the zone to stand for any reason at all. So clinic agents such as Planned Parenthood escorts or volunteers are allowed free access in the zone.

You can see, here's a young lady here (indicating) in a vest standing inside the zone. And in the other photograph we see a man or a woman, I can't tell which, that is standing in the other fixed buffer zone (indicating).

THE COURT: Someone seeking to use that little part of the sidewalk, if they overlap or if they go a bit to their right, you are saying they are in violation?

MR. DEPRIMO: I'm sorry, Your Honor?

THE COURT: See that little portion of the sidewalk -- no. Up. Right there (indicating). You say that is a part of the sidewalk?

MR. DEPRIMO: This whole area is the public sidewalk (indicating).

THE COURT: I understand, but that is the only part that isn't covered, that little --

MR. DEPRIMO: That is correct. The zone comes all the way up here (indicating) and about fifteen or twenty inches from the end of the line to the curb.
That's actually --

THE COURT: So someone seeking to walk down the street would be limited just to that small portion; is that what you are saying to me? Or someone could walk across the zone as long as they didn't try to encourage anybody one way or the other on this issue?

MR. DEPRIMO: The answer to that is it depends.

And it depends based upon if you look at the wording of the statute or if you look at the guidance letter that is offered by the Attorney General for this reason.

There is an exception in the words of the statute, exception No. 4 says that people can walk through the zone.

THE COURT: Can walk?

MR. DEPRIMO: Can walk through the zone.

THE COURT: May.

MR. DEPRIMO: May walk through the zone. To get from point A to point B if they're going to a destination other than the clinic so long as they do it solely for the purpose of going to another destination.

And one of the arguments we made in our briefing and in our complaint was that that is actually vague because a police officer cannot know with any certainty in many circumstances whether or not a person is walking through the zone solely for the purpose of going from one destination to another destination. It is akin to the no apparent purpose language that was in the statute the case of Chicago v. Morales.

THE COURT: The word "solely" isn't used in the statute though; is it?

MR. DEPRIMO: Yes, it is.

THE COURT: It is. But is it used in the Attorney Generals' explanation as well?

MR. DEPRIMO: I don't think so. Well, yes, sort of. Let me try to explain that.

The Attorney General's letter says this: People, anyone actually can walk through the zone to go from one side to the other so long as they have no other purpose for going through the zone except to go from one side to the other.

And they specifically state that you can't engage in abortion speech or partisan speech when you are going through the zone.

So if, for example, you're a pro life advocate, someone who opposes abortion, and you're standing on this side of the zone here (indicating) and you want to get on the other side of the zone which is 50 feet and you're displaying a sign, you have this particular sign and you want to go from one side to the other, can you carry that sign from one side to the other without being in violation of the statute? I don't think you can because that particular sign speaks to abortion.

What if somebody is wearing a cap or a T-shirt or a button that says I am pro choice or I am pro life or anything like that? That's speech that is directed to abortion. The Attorney General's letter specifically says that if you address speech at all concerning abortion or partisan matters, you cannot walk through the zone. You

don't fall within the exemption which means that you actually have to walk all the way around the zone.

I think that's pretty clear. And one of the difficulties with the Attorney General's guidance letter is that it renders the statute content based. This is not like the old buffer zone, the floating buffer zone which was targeted categories of conduct.

The floating buffer zone that Massachusetts had enacted originally was patterned after the statute that was upheld in Hill v. Colorado. That particular statute said that nobody could display a sign or offer leaflets, oral protest, educate or counsel within eight feet of somebody without consent. And the court stressed repeatedly that that was not content based because it did not address a particular subject matter.

The court said it applied to a person who was selling magazines or newspapers as well as people who were speaking about abortion.

In this particular instance here the Attorney General's guidance letter specifically references abortion.

And while I'm here, I think the other thing that's important is is the Attorney General likely is going to argue that the First Circuit in McGuire said that that particular language was content neutral.

Here's why I think it is distinguishable. In

McGuire the only thing that was at issue there, at least with respect to this particular issue, was whether or not the clinic exemption violated equal protection or was viewpoint based. And the court found that it was not.

The guidance offered by the Attorney General in the McGuire case only defined what it meant to be acting within the scope of somebody's employment.

The exemptions here and in McGuire are identical. Now, they were termed differently by the Attorney General in this particular case but as worded they're identical between this statute and the old statute.

And the second exemption in the floating buffer statute that was at issue in McGuire stated that clinic employees and agents acting within the scope of their employment were exempted from the provisions in the zone.

So the Attorney General came back so, to avoid any kind of viewpoint discrimination or equal protection claim and said, okay, we are going to define the term "scope of employment" simply to mean somebody who is not engaged in any kind of abortion speech or partisan speech but somebody who is simply assisting a patient through the zone.

And the First Circuit said that that's a rational basis for having that kind of exemption. In the original floating buffer statute, which by the way was an 18-foot fixed area, and then within the 18-foot fixed area one could

not approach within six feet without consent -- I'm losing my train of thought here.

Oh, in that 18-foot area there was no -- like Hill v. Colorado there was no restriction, Your Honor, with respect to people going in and out or standing aside. So the 18-foot area may have been sort of like this (indicating), you know, it was much smaller.

And theoretically that particular buffer zone, that 18-foot fixed buffer zone could have gotten very crowded. You know, people could have been in there displaying signs. People could have been there distributing literature. People could have been just standing around.

So there certainly could have been a rational basis for the government to say that an escort would actually be assisting a patient in going into the clinic.

That's not the case here. This is a hard buffer zone in this particular instance here. No one can go inside of that 35-foot zone unless you fall within the exemption.

Unlike McGuire, there is no -- it seems to me that there is no public safety concern with respect to patients being able to access the clinic entrance. This zone is completely free of people. The only people standing in the zone are the Planned Parenthood escorts. You take them out, and --

THE COURT: Well, the fact that it is safer or the

fact that it is more convenient isn't fatal to it; is it?

MR. DEPRIMO: No. Actually what I'm getting at --

THE COURT: You seem to be arguing that the added safety benefit of the enlarged circle makes it unconstitutional.

MR. DEPRIMO: Well, actually let me address that right now because I think we're directly on point.

The original buffer zone, the original floating buffer zone was an 18-foot fixed zone.

THE COURT: And this one is 36.

MR. DEPRIMO: This one is 35. So essentially they doubled it.

There is no testimony whatsoever in the record that anybody, that anybody said that that 18-foot zone was insufficient.

Now, in 2000 the Legislature found that an 18-foot fixed buffer would have been sufficient to address the problems that were before them, which was unwanted approaches.

Getting back to the record in 2007. As I mentioned, there is no testimony from police. There is no testimony from abortion providers. There is no testimony from abortion agents. There is no testimony from the Attorney General. There is no testimony even from legislators that that 18-foot fixed buffer zone was

insufficient to be able to cure the problems that they were seeking to remedy. Okay.

Why is it that they doubled it from 18 to 35 feet? Okay. That was arbitrary and capricious. There is no evidence in the record, whether it's testimony or anything else, that indicated 18 feet, an 18-foot fixed buffer zone was insufficient.

The only reason it seems to me that they doubled it was because --

THE COURT: The 18-foot buffer zone -- make sure that I have got this correct in my mind -- also had the floating buffer zone feature.

MR. DEPRIMO: Yes.

THE COURT: This is different.

MR. DEPRIMO: Yes.

Here's my point, Judge. My point, Your Honor, is this:

You take away the floating aspect of the original buffer and you just leave the 18-foot restriction in, it cures all of the problems that were before the Legislature in 2007.

THE COURT: Let's say you are right. So you come back to the question that I asked you, that what you are basing it on is that, assuming there is no floating buffer, you are saying that the fact that they doubled it itself was

an unconstitutional act?

MR. DEPRIMO: What I'm saying, Your Honor, is that the -- that in order for this to be legitimate or a permissible time, place and manner regulation, in order for that, for it to even qualify as a time, place and manner regulation it has to be content neutral. I think it's content based.

But assuming for the moment that this is content neutral, even a content neutral regulation of speech must be narrowly tailored to a significant government interest and leave open ample alternative avenues of communication.

And my point is is that there was no evidence in the record whatsoever, we are not talking about one iota, one scrap of testimony or any kind of documented evidence that said that an 18-foot fixed buffer zone wouldn't have solved the problem that was being addressed.

The police officers testified that the difficulty that they were having --

THE COURT: You are saying that if we were here because the statute was amended to eliminate the floating zone, you wouldn't be here.

MR. DEPRIMO: No, that's not correct, Your Honor. I'd still be here. I think --

THE COURT: I would miss you if you weren't but, I mean --

(Laughter.)

THE COURT: You seem to be pointing at the floating buffer, I mean the 18 feet versus 36. The only real difference then would be, except for the expanded circumference, would be the fact that there is no buffer here. So I am saying if what they did was keep it at 18 feet and took out the buffer, you would have no objection?

MR. DEPRIMO: That's not correct. I still think it would be unconstitutional for this reason:

I think the Supreme Court in Schenck and in Hill unequivocally stated that speakers have the right to speak with their attentive audience from a conversational distance.

And in Schenck the Court found as a matter of law that fifteen feet was not a conversational distance. The Court in Hill noted that an 8-foot restriction was less than fifteen feet and allowed for a conversational distance.

Eighteen feet, of course, is beyond the fifteen feet so I think even an 18-foot fixed buffer zone would be unconstitutional under Schenck and Hill because it didn't allow for the conversational distance.

The point that I am making is is that there was no reason, there is nothing in the record that justifies the Commonwealth from doubling from 18 feet to 35.

The key for a time, place and manner analysis is

what is the targeted evil. What does the government seek to remedy with their statute?

In their findings and conclusions, in finding No. 20, proposed finding No. 20 and proposed conclusion No. 53, the Commonwealth tells us that what the Legislature found was that the problems they were seeking to remedy -- and this is their language -- the problems occurred immediately adjacent to driveways and clinic entrances. They said the problem was, the Legislature found that people were standing very close to the door. That's their terminology.

People were standing very close to the door. And that was causing a problem because as people entered into the clinic and exited the clinic, because people were so close to the door, people would brush up against the signs. People would be hit by their, you know, would bump into their umbrellas and such.

So that's their targeted evil. Their targeted evil is conduct that occurs immediately adjacent to driveways and immediately adjacent to the clinic entrances.

When we are talking about speech, distance has everything to do with whether or not an ordinance is narrowly tailored.

As I pointed out earlier, I think, in Hill v. Colorado the court upheld that statute. And one of the

things that they said was that 8-foot floating buffer seriously burdened speech, seriously burdened speech.

However, because individuals were allowed to go into the zone and stand in a particular place next to the door, they were still able to stand next to the pathway of pedestrians to hand out their literature which the pedestrian could easily accept. And they were still able to speak with people from the conversational distance because they had no duty to --

THE COURT: You keep talking about "conversational distance." And just looking again quickly at the Attorney General's brief, paragraph 20 in the substantive paragraphs, there they are talking about not conversational behavior but more startling, you know, yelling, screaming, waving signs.

So wouldn't it be reasonable for -- this is with an 18-foot perimeter. Wouldn't it be reasonable for them to think you need double the space to protect the privacy (sic) of those people who want to go in and out without being harassed?

MR. DEPRIMO: Well, the interest is not protecting the privacy. As a matter of fact, one of the difficult --

THE COURT: The privacy? Did I say privacy?

MR. DEPRIMO: You said privacy.

THE COURT: I didn't mean that.

MR. DEPRIMO: Are we talking about safety?

THE COURT: Yes.

MR. DEPRIMO: I think certainly --

THE COURT: Well, safety, safety and fear. In other words, being put in fear. If you characterize that as part of safety, I mean, these people have testified, at least in the proposed findings they seem to testify that they were frightened with the demonstration or the waving of the signs and the screaming at them from the 18-foot barrier.

MR. DEPRIMO: Your Honor, there is no testimony from any patient at all in the record. Now, there may be, it may very well be that you have Planned Parenthood saying, testify or you have volunteers testify --

THE COURT: Well, there are a number of proposed findings here in this twenty --

MR. DEPRIMO: Yes.

THE COURT: -- that --

MR. DEPRIMO: I'm talking about the actual testimony.

The point that I'm trying to make with respect to proposed finding No. 20 and conclusion No. 53 is the location where the problem is. The location of the problem that they're trying to cure they say is immediately adjacent to the driveway and immediately adjacent to the door.

So if you were to look at this photograph here

(indicating), Your Honor, for example, the doorway is actually the width of this fixed buffer zone where we have the white lines.

(Pause in proceedings.)

THE COURT: Go ahead.

MR. DEPRIMO: The fixed buffer zone is right here (indicating) where we have these white lines. This (indicating) is the entranceway to the door.

If you move people two or three feet, perhaps, from this buffer zone here (indicating), there is no danger of anybody walking in being hit with a sign, accidentally being -- actually not being hit with it but bumping into a sign or even bumping into an umbrella.

One of the difficulties I think that the Attorney General is going to have in trying to argue their case is that it's not merely the secondary effects of speech that they're targeting but the primary effects as well.

The secondary effects of the speech are bumping into signs, blocking, impeding, trespass, things of that nature. Physical harassment, assault, all of those kind of things are secondary effects.

But the reaction that somebody has to particular speech is a primary effect. That's not a secondary effect. That's a primary effect. As a matter of fact, in the case of Buse v. Gary (ph.), that is exactly what the Court found.

In that particular case there was a, I think District of Columbia law that prohibited saying disparaging things about ambassadors and, you know, foreign nationals and stuff. And the court came back and said that and they claimed, they claimed that that law was targeted at the secondary effects of the speech. And the court came back and said no, that's the primary effect of the speech. Somebody's reaction is directly related to the content.

THE COURT: But if that is not the intention, the fact that it has that incidental consequence doesn't make it unconstitutional.

MR. DEPRIMO: Oh, that's not incidental though, Your Honor. If it is the content of the speech, in other words, if --

THE COURT: If it is not the content, in other words, if the intent is not to control the content of the speech but these public safety matters instead, but if in doing so it incidentally impinges speech, that is permitted as I understand the case.

MR. DEPRIMO: I don't believe so, Your Honor, for this reason. Content --

THE COURT: McGuire doesn't say that?

MR. DEPRIMO: A content neutral time, place and manner regulation is just, it has to be justified without reference to the content of the speech. And what I am

saying is if, if the Commonwealth is concerned about listener reaction, then that is directly related to the content of the speech and that takes it outside of the time, place and manner test.

THE COURT: It could be both though, as long as the intent, as long as the intent is for safety, the fact that there is an incidental, coincidental and incidental impingement on the speech is not barred.

MR. DEPRIMO: I think this is what --

THE COURT: I think McGuire says that; right?

MR. DEPRIMO: I don't think it says that. I think what McGuire says is is that a time, place and manner regulation that is directed toward the secondary effects of speech -- the secondary effects, we are talking about impeding, blocking, assault, criminal harassment, trespass, those kinds of things. If the law is targeted at remedying those kind of things, the fact that it incidentally burdens speech is of no moment. That's what it said.

THE COURT: Right.

MR. DEPRIMO: Okay.

THE COURT: That is what I was trying to say but not as articulately as you just did it.

MR. DEPRIMO: Well, the difference is, Your Honor, is that reaction to speech is not a secondary effect. Reaction to speech is a primary effect.

I say something and it makes you angry. I say something and it upsets you or I display a sign or I give you a piece of literature. It's the content of the speech that makes you angry.

If I say, "Good morning, Your Honor," you're probably not going to get angry with me.

THE COURT: But, see, the way you pose it you can never win the argument. It is like which came first, the chicken or the egg, that type of thing.

MR. DEPRIMO: I am not following you, I'm sorry.

THE COURT: Well, I mean, the way you posit the -- any time that there is an impact on speech, you say that is the prime purpose of the restriction. They say the prime purpose of the restriction is safety. They agree that it also has an impact on speech. As soon as they say that, you say, well, that trumps everything. If it has an impact on speech, then that is the trump card.

There can't be any impact on speech regardless of what the intent was because if there is an impact on speech, we have to assume that the intent was to control the speech.

Aren't you saying that in effect?

MR. DEPRIMO: No. No. I'm not saying that at all. I think I'm not making myself clear to the Court.

What I'm saying is that when a speaker wants to speak, okay, and the government regulates the place of the

speech in such a way that it causes an incidental burden on their speech, that is permissible. Okay.

For example, if you move somebody from being right next to the door and you move them back five feet, that is a burden on their speech. You move them back eight feet, that is a burden on their speech.

THE COURT: Then we see whether it is reasonable.

MR. DEPRIMO: Yes. Is that permissible? The Supreme Court said in Hill, yes, it is permissible.

What I'm talking about is not what the speaker, I'm not talking about the impact on the speaker. I'm talking about an impermissible consideration. I'm talking about the impact on the listener.

What I am saying is is if the government is trying to regulate speech because it upsets the listener, that is not permissible because that's not a secondary effect. That's a primary effect.

They're looking at the content of the speech and they're saying that what the speaker is saying is upsetting the listener and we can't have that. We can't have the listener upset so we are going to regulate the speech in such a way as to push these people back so that the listener is not upset.

THE COURT: Suppose it is not the speech but it is the manner in which the speech is portrayed. In other

words, it is done in a way that is at least arguably frightening to those who hear it. Forget about the message. They just hear the noise, the chatter, see the signs and they find that frightening. Now, isn't that legitimate police activity to try to correct?

MR. DEPRIMO: I think the Supreme Court would say no. The Supreme Court says that since this must tolerate insulting and even outrageous speech in order to provide for the breathing rooms that are necessary for the First Amendment.

As a matter of fact, the court has even gone further. They said if it is the offensiveness of the speech that is causing the problem, that's the very reason why the speech needs to be protected.

THE COURT: But, see, I am not talking about the speech itself. I am talking about the manner in which the speech -- the manner in which the message is conveyed.

MR. DEPRIMO: Somebody screaming, for example.

THE COURT: Screaming, yes. Waving signs. Putting signs at the window of a car, leaning in and somebody that might be in another setting considered to be an assault.

MR. DEPRIMO: I think that that actually would be valid. I think -- and that's what I think the Supreme Court said. Basically what the Supreme Court said in Hill was this:

There is an aspect of privacy that even reaches public sidewalks. Okay. People on public sidewalks can't be shielded from all unwanted speech. But basically what the Supreme Court is saying is this:

There is a certain amount of personal space that people are entitled to. And if they don't want to hear a message within close proximity, they don't have to do it. And that's what the Hill statute was designed to do.

If somebody did not want you to approach and they made that clear, you could not make the approach. Could you speak to them from eight feet? Could you yell at them from eight feet? Could you show them an offensive sign from eight feet? Yes, you could. And you could do that under the statute that was at issue in McGuire as well, except the distance was six feet.

There was no ban at all with respect to the content of the message. The Court is correct, it was the manner in which it was done. It was the fact that it was done in such close proximity that it was causing an offensiveness with respect to personal space. But it didn't have anything to do with the content of the message. The Court made that clear. If it's the content of the message that's offensive, the regulation is no longer content neutral. It's content based.

And if it's content based, then it's a whole

different legal standard.

Now, the government has to satisfy the strict scrutiny test. They have to demonstrate compelling interest for the regulation and that the regulation is the least restrictive means of achieving that interest.

And as the First Circuit said, content-based restrictions rarely survive constitutional scrutiny.

There is no case around an abortion clinic that I am aware of in which speech was ever analyzed under the strict scrutiny standard.

So it seems to me that the court upheld it under compelling interest so it seems to me what the court is saying is is that content-based restrictions around abortion clinics simply are not valid.

There is no case I am aware of in which a content-based restriction around an abortion clinic was upheld. Offensive signs, offensive speech, constitutionally protected. People want to shout, people want to yell. If they're breaching the peace, arrest them for breaching the peace. But you can't regulate their speech with a law of general application that puts everybody back simply because of a couple of people who happen to raise their voice.

That's the same situation I think that exists in this case with respect to the couple of folks who are wearing the police caps and the police T shirts

(indicating). The problem that the government found in that particular situation is is that when patients drive up and these people with the police cap and the shirt, they wave at them, the patients assume it is a police officer. And they wave them in and say, you know, yeah, you can come and talk to me.

And what the government is saying is that that's essentially a way of duping the patients into allowing an approach that the patient probably didn't want in the first place. And so these individuals were arrested.

THE COURT: Do you disagree? I mean, would you protect that?

MR. DEPRIMO: Well, let me defer to the Court, Your Honor, because the Massachusetts State Court found that that was constitutionally protected, that that conduct was protected by the First Amendment.

Captain Evans testified either in his affidavit or in his testimony before the Senate, and I think it was before the Senate, that they actually did try to or actually did issue citations of arrest on these people for impersonating police officers. And it was thrown out by the court on the grounds that there was First Amendment protected conduct.

You cannot, the government cannot specifically target first -- protected First Amendment conduct and say

that's the problem. And I think that's what happened. I think that may be something that one has to look for. It is a very creative way of getting somebody to consent.

Did the person in the car consent? Yes, they did. So was the person in violation of the law? No, they weren't. They didn't approach without consent. Very creative way of getting around the law but it was constitutionally protected.

That was the only, the only type of illegal conduct that Captain Evans actually pointed to with respect to why they needed a fixed buffer zone outside the abortion clinics.

Generally speaking Captain Evans testified that, hey, look, we can't tell whether or not somebody is making an unwanted approach. It makes it difficult for us --

THE COURT: Because of the floating --

MR. DEPRIMO: Because of the floating.

THE COURT: Which we have eliminated here.

MR. DEPRIMO: Which we eliminated here.

But my point is, Your Honor, there is no testimony by Captain Evans that there was any kind of unlawful conduct occurring outside the clinic. He didn't say -- first of all, he said that --

THE COURT: It doesn't have to be fresh, it can't be stale, but you can go back to the record that they had in

the First Circuit in McGuire.

MR. DEPRIMO: Well, to some degree. In Bl(a)ck Tea Society the First Circuit said that the government can consider past experiences; but, I mean, there has to be a fairly reasonable nexus, a plausible nexus between what happened in the past and what's happened in the future.

The point that I would like to make is that the original floating buffer statute was enacted in the year 2000. This fixed buffer statute was enacted in 2007. There is no evidence that anything happened between 2000 and 2007 that warranted the increase in the size of the buffer zone or even the fixed buffer zone but for the fact that the police were having difficulty in enforcing it. That's it.

No testimony whatsoever from either Captain Evans, Detective O'Connell or Lieutenant McDermott who all had said that they're out at the clinics, you know, on a regular basis.

Captain Evans said that police were constantly watching protestors on Commonwealth Avenue, Planned Parenthood. Constantly watching. Okay. He was commander there for nine years, I think between 1998 and 2007 or thereabouts.

No mention of impeding. No mention of blocking. No mention of harassing. No mention of trespassing. No mention of any kind of illegal conduct other than what he

considered the impersonating the police officer which the court found to be protected conduct.

The only thing that he found was that we can't tell whether or not somebody is making an unconsented approach. That's all.

Detective O'Connell --

THE COURT: We can assume that what he is saying is that we need more room to make the decision.

MR. DEPRIMO: I think what he's saying is that we can't tell whether or not the approach is unconsented.

If we have a fixed buffer zone and the line is fixed and we know that somebody steps from a point outside the buffer zone and goes inside the buffer zone and stands there --

THE COURT: And they have no reason to be there?

MR. DEPRIMO: Well, but the bright line is that they're violators of the law.

THE COURT: Yes.

MR. DEPRIMO: You can stand here.

THE COURT: But if it is the floating situation, that is when they were hampered. They couldn't tell where someone was headed. And so they decide as a remedy for that weakness to expand the perimeter and give us what we now are litigating, this 35-foot perimeter; isn't that basically what happened here?

MR. DEPRIMO: Well, I think what happened here -- what's confusing to me, first of all, is the whole idea of doubling it from 18 to 35 feet. My personal view is is the reason that they did that had nothing to do with any of the evidence that was before the Legislature. I think it had to do with some lawyer pointing out to the sponsor of the bill that, hey, look, in Madsen the court approved a 36-foot injunction so anything less than 36 feet is constitutional so why don't we just make it a 35-foot fixed buffer. I think that's what happened. Because there is no evidence that says you need a 35-foot buffer as compared to an 18-foot buffer.

The only problem, the only problem --

THE COURT: There is no case yet that says that 35 or 36 feet is too much?

MR. DEPRIMO: Well, actually Schenck which was an injunction case said that a 15-foot floating buffer was unconstitutional because it didn't allow for the conversational distance.

I think you have to sort of look at those two things, you have to look at that and say that it's impermissible because no conversational distance and you can't leaflet. You can't stand in a particular place and leaflet.

THE COURT: Why don't I give you a chance to catch

your breath. I will certainly listen to anything else you have to say. I will give you a little rest and give the other side a shot. Okay?

MR. DEPRIMO: Sure. Thank you, Your Honor.

MR. SALINGER: Good morning, Your Honor.

THE COURT: Good morning.

MR. SALINGER: I'm hoping to do four things this morning, hoping that they'll all be helpful.

First is to underscore two key facts or sets of facts that are undisputed. It is always nice to remember where we have common ground.

Second, to correct a couple of statements made by opposing counsel in his opening regarding some of the legal framework.

Three is to touch on some of the high points. I'm certainly not going to repeat everything you have already submitted but you already had some high points regarding specific requirements of the claims asserted by the plaintiffs.

And then, fourth, most importantly, ancillary questions the Court has for us.

THE COURT: Okay. Go ahead.

MR. SALINGER: Your Honor, those two undisputed facts. First of all, it appears to be undisputed that the Legislature had a legitimate content neutral purpose for

revising this statute. Indeed, in paragraph 121 of plaintiffs' proposed conclusions of law, the plaintiffs ask the Court to find that the fixed buffer statute was designed to protect the health and safety of women seeking reproductive health care services and that this is a legitimate interest.

Now, that's actually a little too narrow. The Legislature was trying to protect not only patients of clinics but also staff of clinics, volunteers, friends and family of patients, other people walking by. And plaintiffs themselves make that point in their complaint in paragraph 17 when they basically paraphrase the preamble for the Senate bill that became the final statute. And that is in evidence as Trial Exhibit No. 20. That talks about the Act being revised in order to preserve public safety by creating clearly defined boundaries.

And, finally, and most simply, the Legislature itself said that its purpose in passing this statute was to protect public safety. That's Trial Exhibit No. 1. The emergency preamble to the law in question states that the purpose of the revised act was "to increase forthwith public safety at reproductive health care facilities."

So that's the purpose. That's content neutral. And as the First Circuit reminds us in the recent Naser Jewelers case that we cite in paragraph 46 of our proposed

findings, a statute that is content-neutral like this one enjoys a presumption of constitutionality.

Your Honor, there is a second set of facts that really is undisputed and that's the nature of the legislative record, the legislative facts that the Massachusetts great and general court considered before revising the statute.

Part of it, as the Court suggested, was the factual record that the Legislature had created back in April of 1999 that the First Circuit credited and discussed at some length in its McGuire opinions which we discuss in our proposed findings at paragraphs 7 to 10.

But in addition, this goes to paragraph 20 that Your Honor was discussing with opposing counsel from our proposed findings, there was a hearing in March of 2007 before the Legislature's Joint Committee on Public Safety and Homeland Security. And they got testimony in written form and oral firm and there was a video presented.

They got a lot of information that demonstrated that despite the existence of the original act with that floating 6-foot buffer zone within an 18-foot larger area, there continued to be problems of harassment, intimidation, individuals being put in fear at those bottleneck points where folks were trying to enter or exit a reproductive care facility through a door or by driving through the driveway.

The subparagraphs in paragraph 20, I know you're familiar with them, but they show that individuals learned that under the original act because there was that approach requirement, they could be wherever they wanted even within the 18-foot zone as long as they didn't approach anyone. So they learned that they could safely stand right next to or right in front of the door or driveway. They could block people. They did so.

The Legislature learned that people would block the doors and scream at folks trying to get into the clinic. There was an anecdote by a young patient trying to come to a clinic and her grandfather trying to accompany her got almost knocked down. There were real public safety problems. And that record is undisputed because it is what it is.

Part of that record, Captain Evans of the Boston Police specifically recommended to the Legislature that they adopt this revised statute with a fixed 35-foot buffer zone just to clear out those bottleneck areas and make them safe so that they were no longer focal points of jousting and to enhance public safety in that way. That's what the Legislature did.

Your Honor, I should just note --

THE COURT: Is it your position that 36 feet may not have been necessary but it was a permissible choice for

the Legislature to make?

MR. SALINGER: Absolutely, Your Honor. And the U.S. Supreme Court has spoken to this point. We discuss it in our proposed findings around paragraphs 68 to 73.

There was a suggestion by opposing counsel, perhaps he misspoke, that the Legislature is required to use the least restrictive solution. That's actually 180 degrees wrong. What the Supreme Court has repeatedly said is that under this three-part test from Ward versus Rock Against Racism, the three parts of content neutrality, narrow tailoring and ample alternative channels of communication, that narrow tailoring prong can be met whether or not the Legislature, or in the case of an injunction the court, has chosen the least restrictive solution.

It was striking, Your Honor, in the Burson case, which is not a clinic case, that's the case involving a hundred foot buffer zone around polling places. An argument was made that, geez, even if you need some sort of buffer zone, a hundred feet is too big.

And what the Supreme Court said in Burson is that that issue was not "of constitutional dimension."

The First Circuit in the Bl(a)ck Tea Society case relying on the Supreme Court's decision in Ward makes clear that plaintiffs simply cannot come into court and ask this court to second-guess the legislature's judgment about

whether the right number was 35 feet or should it have been 18 feet or should it have been 42 feet.

On this narrow tailoring prong, Your Honor, the reason why this statute is narrowly tailored is, as Mr. Deprimo suggested, because it's focused on the problem that the Legislature is trying to cure: The problem of safe access to reproductive health care facilities.

We suggest, Your Honor, that the Supreme Court's decisions in both the Schenck and the Madsen cases, although they involved injunctions and did not involve statutes, are very instructive on this question of how big is big enough and what does it mean to be narrowly tailored. Because both of those decisions the court upheld part of an injunction order imposing a fixed buffer zone and struck down another part of an injunctive order.

Madsen was the first of the two cases so perhaps I should start there. In Madsen at issue was an injunction that in part created a 36-foot buffer zone. That was not 36 feet around entrances or driveways like here. It was 36 feet around the entire clinic property line. Much, much bigger than the fixed buffer zone at issue here. The court held that that fixed buffer zone was constitutional. It was narrowly tailored to protect safety around and access to the clinics.

In contrast there was also a part of that

injunction that sort of like the original act here had a no approach requirement. You could not approach people who did not want to be approached and that was within a 300-foot area around the clinic. The court struck that down because that 300-foot area was not narrowly tailored to the problem of safety around and access to the clinic.

Similarly in Schenck, Your Honor, part upheld, part struck down. In Schenck, part of the injunction set up a fixed 15-foot buffer zone around the clinic entrances and driveways. And the court held that that was constitutional. That was narrowly tailored.

The suggestion that Schenck somehow means you have to be able to get within a few feet of individuals no matter where they are in the world in order to have a normal conversation with them can't be squared with the actual holding where the court said no, no, a fixed 15-foot buffer zone is permissible under the Constitution.

What the court struck down was that floating 15-foot buffer zone because it was not narrowly tailored, because it was moving around. It was very hard to figure out. If you were wanting to try to speak with somebody on the sidewalk and they were walking down a 17-foot wide sidewalk, very hard to figure out how to comply with that.

So both of those cases given what was upheld versus what was struck down are guidance that when a Legislature in

this case, or as in those cases, are faced with a public safety problem at a fixed point, it is constitutionally permissible to clear out the area around that fixed point with the kind of buffer zone legislation that was enacted here.

Your Honor, that actually brings me to one of the two --

THE COURT: Buffer zone legislation that was enacted here or it was eliminated here?

MR. SALINGER: That was enacted here, Your Honor. The fixed 35-foot buffer zone that we are talking about.

THE COURT: Okay. Not floating. Okay. Go ahead.

MR. SALINGER: Your Honor, the first two things that Mr. Deprimo said, respectfully I have to take issue with them.

He first of all characterized the statute at issue here as a ban on certain kinds of speech. That is not right. No message is banned. No speech is banned. No manner of speaking is banned.

What this statute does, just to make sure we are all on the same page here, is it establishes an ability for reproductive health care facilities to clearly mark and post a buffer zone. If they do that, then -- and they do it no more than 35 feet from their entrance or driveway, then during clinic business hours, nobody is allowed in that zone

unless they fall within one of the four exemptions:

If they are on their way into the clinic; if they're just crossing through the zone to get somewhere else; if they a municipal employee acting within the scope of their employment; or if they're a clinic employee or agent acting within the scope of their employment.

The U.S. Supreme Court in the Hill case specifically pointed out that a buffer zone restriction of this kind does not as a matter of law operate to ban any speech. What it is is it has the effect of limiting the time or place within speech, within which speech may happen. And so it's under that time, place or manner doctrine that we have to analyze it.

This is not a statute that bans speech.

Now, the second thing that I must respectfully take issue with, early in his remarks Mr. Deprimo suggested that the Supreme Court's Madsen decision is distinguishable in favor of the plaintiffs because that case involved an injunction and this one involves a statute.

Well, factually, of course, that's correct; but he has it sort of backwards here. In Madsen and then in Hill the Supreme Court has made clear that a statute of general application like in this case is subject to less stringent scrutiny against constitutional claims like these as compared to an injunction.

In Madsen the Court made the point one way. Madsen involved an injunction. And so the court said, you know, we're going to give this a harder look than we would if it was a statute.

A few years later in Hill the court was faced with a statute and they made a point of emphasizing -- and we give the cite in paragraph 44 of our proposed findings.

They made a point of emphasizing that because the statute reflects a general policy choice by the State Legislature and it is not targeting the behavior of particular individuals the way an injunction typically does, the statute, the buffer zone statute there, like the one here, is assessed under the less stringent constitutional standards set forth in Ward.

So I wanted to make those two corrections.

Your Honor, I want to just quickly point out the fact, as you, of course, know because you're the one who did this, the Court at plaintiffs' request has bifurcated this case and we are only dealing with the facial challenge at this point. The as applied challenge will be dealt with later.

And I know that simply because when we read plaintiffs' proposed findings of fact around paragraphs 10 up through 42 they provide a lot of detail that comes from their affidavits regarding what they say is going on on the

ground at the clinics outside Boston and Brookline.

We think it would be inappropriate for the Court to make any of those requested findings because they really go to the as applied challenge. We haven't had a chance to do our discovery. We haven't tried to challenge them here because that's been put off for another day.

Your Honor, as I suggested a few times, the main claim in this case is the question of whether this is a content-neutral statute that is narrowly tailored and leaves open ample alternative avenues of communication. That's the Ward test that the First Circuit applied in McGuire. And it is the test that governs here.

I have already touched on one key reason why this statute is content-neutral. It's content-neutral for the same reason that the original act was found to be content-neutral in McGuire because the legislative purpose for the law is content-neutral. The purpose is to protect public safety. As a matter of law, that makes the statute content-neutral.

We have noted, Your Honor, in paragraph 47 of our proposed findings that under the Supreme Court's Hill decision --

THE COURT: Let me ask you this:

Is there anything that is in the record -- I should really ask plaintiffs' counsel this -- that has changed

sense McGuire that might affect the determination as to whether the statute is content-neutral?

MR. SALINGER: There were --

THE COURT: I will ask him.

MR. DEPRIMO: Yes, Your Honor. Something very significant as a matter of fact.

THE COURT: What is it?

MR. DEPRIMO: And that is the guidance letter that was issued by the Attorney General.

What's very significant is that, as I mentioned earlier, in the McGuire case the court found that the exemption with respect to clinic employees was content-neutral even though it specifically said that employees and agents could not speak about abortion or partisan matters. Okay.

All that did was is simply said if you want to talk about abortion or partisan matters, you don't fall within the exemption. You're outside of it.

Could clinic employees and agents go inside that zone and talk about abortion? Sure they could. They could talk about abortion as much as they want. They can display signs. They can distribute literature. They could protest. They could do whatever they want.

The only thing they couldn't do, they couldn't approach somebody within six feet without an approach. So

all that did was, that limiting language was simply say this is when you're acting within the scope of your employment. If you are not, then you fall under the general prohibition. If you want to talk about abortion, if you want to get close to the six feet, you need to have consent.

In this particular case you have that same language in the second exemption, okay. We are talking, what they say is the clinic employee and agent, if you want to be within the scope of your employment, you can't talk about partisan matters. You can't talk about abortion. Okay.

So what does that do? If you are a clinic employee, okay, you want to talk about abortion or partisan matters, it takes you outside of that exemption. What does that do? That drops you down. That either completely excludes you from the zone altogether or it drops them into exemption No. 4.

What does exemption No. 4 say? People can walk from point A to point B through the zone so long as you don't talk about abortion or partisan matters. You can talk about the weather. You can talk about the sports score last night. You can talk about your grandchildren. You can't talk about abortion.

That is what makes this different from McGuire and from Hill. Anybody could talk about any subject matter they wanted to. There was no restrictions whatsoever with

respect to subject matter. Under Hill and under McGuire it was categorized. No sign display, no leafleting, no oral protest, no education, no counseling within six feet without consent.

And the court stressed that it wasn't topical or subject driven because it applied to everybody, okay. If you wanted to --

THE COURT: Okay. I get what you are saying.

What do you say about that?

MR. SALINGER: Your Honor, the Attorney General's guidance letters in January of this year are entirely consistent and, indeed, come directly from the First Circuit's decision in McGuire. In McGuire the court was looking at an earlier Attorney General instruction.

Mr. Deprimo is correct, it is not the clinic employee and agent exemption. The First Circuit in footnote one of McGuire, 386 F.3d at 52, said the Attorney General had clearly construed that exemption to exclude pro abortion or partisan speech. That's the First Circuit's words.

Then at page 64 of the decision the First Circuit held that, "The Attorney General's interpretation is clearly a proper content-neutral way of interpreting the exemption."

The Attorney General in the January letter informing folks how you should interpret these exemptions was merely reiterating the guidance using the language of

the First Circuit, making sure as the First Circuit wanted the Commonwealth to make sure of, that these exemptions would not be a way to let people go into the buffer zone and engage in partisan or abortion-related speech because that might raise some question about the content-neutrality of the statute.

So because the Attorney General's guidance simply matches what the First Circuit has already explicitly held to be content-neutrality, it is still content-neutral today.

While we're on the topic of the guidance letters, Your Honor, plaintiffs have made a couple of other points about them today.

THE COURT: Go ahead.

MR. SALINGER: Why don't I respond to both of those as well right now.

First there has been a suggestion that there is no longer any rational basis for the clinic employee or agent exemption. Maybe it was needed under the old act where people were free to be in the buffer zone. But it's not needed at all under the current act because the current act basically, to use the language from plaintiffs' proposed conclusions paragraph 170 asks the Court to find that under the revised act pro life advocates and virtually all other persons are excluded from the zone, close quote.

Your Honor, this new rational basis argument is

really a red herring. First, the factual premise of it is wrong. You're not excluded from being in the buffer zone legally if you are a pro life advocate. Indeed, the Attorney General took pains to make clear in the recent guidance letters that anyone is free to use the exemptions for crossing through the buffer zone to get to the other side or to go somewhere else, even if you're a pro life advocate or a pro choice advocate and your point in crossing through is to communicate that message on the other side. You can't engage those partisan speech activities inside. But the factual premise of this argument that the world was excluded from the buffer zone is wrong.

No. two, it is rational for the Legislature to be concerned that even though the statute may say people are supposed to remain outside the buffer zone, it could be that not everybody will comply with it.

Your Honor, just a few days ago there was an incident, it is not in the records, we're not asking you to make findings on it but just in answering the Court's questions about these guidance letters. Somebody at the Boston clinic came right up to the front door, stood there screaming at people, just the kind of behavior that the Legislature was wanting to stop.

Eventually the person was able to be convinced to move off. As I understand it, there were no police there

that day.

We can make the same point by hypothetical, Your Honor. The Legislature could rationally think that clinics would still under the current act have reason to want to have employees or agents in the buffer zone to greet staff, to greet patients and friends and family and help keep them safe as they come into the clinic.

So the notion that there somehow is no longer a rational basis for the exemption we think just as a matter of law can't fly.

Your Honor, there is a third point that plaintiffs have made about the guidance letters. And these go to the exemption for crossing through. In their sixth cause of action they have asserted that the statute should be struck down as void for vagueness.

And the real thrust of their claim we notice from their proposed conclusions is they say this exemption to cross through solely for the purpose of reaching a destination other than the facility is vague because who can know what that means.

Well, the Attorney General has in the January 2008 guidance letters given a very common sense greeting to that. She makes clear that the exemption allows someone to walk through the zone either to reach the other side or to travel to someplace altogether. And that is sufficiently definite

to pass muster under the due process clause.

We point out in paragraph 118 of our findings that just as the Attorney General's previous guidance was given credit and weight in McGuire in making sense out of what that statute meant, so the revised guidance is entitled under the Supreme Court's jurisprudence and under McGuire to be relied on here.

The simple reason, Your Honor, why the prior guidance letters didn't talk about this exemption and the new one does is because even though the language of the exemption didn't change, it wasn't until this lawsuit that the office was aware anybody believed that the exemption was hard to understand.

In the prior lawsuit McGuire there was no challenge to that exemption. At that point in time it seemed that the plaintiffs and other protestors could understand the exemption. And we submit that the Attorney General's guidance is perfectly understandable today.

Your Honor, going back just briefly to that Ward test. We've talked about how the statute is content-neutral because it has a neutral purpose. It's also content-neutral for another reason that I cited. It doesn't ban speech. It only restricts, has the effect of restricting the time and place of speech.

And the Supreme Court in Hill specifically held

that that is an independent reason why this kind of buffer zone statute is content-neutral.

A third independent reason is that the revised statute was not adopted because of disagreement with anyone's message. This is not a statute that targets speech by abortion opponents or even targets speech about abortion or for that matter targets speech at all. Instead, as I said earlier, Your Honor, what this statute does is it clears out the area around clinic entrances and driveways in order to make them no longer be those bottlenecks that threaten the public safety.

Your Honor, the statute is also a narrowly tailored statute. We touched on the fact that the solution matches the problem. The problem is around clinic entrances and driveways. And that's where the buffer zone applies.

I've already addressed the point that it is simply wrong to say that plaintiffs can say, oh, eighteen feet should have been enough. That's a judgment for the Legislature and not an issue of constitutional dimension.

I would just add on the narrow tailoring, Your Honor, the point that the Supreme Court made in Hill that a Legislature like the Legislature that adopted the statute there is free under the Constitution to take a prophylactic approach.

There have been suggestions that this statute is

somehow flawed because it affects people who haven't previously broken the law. This again really is confusing this statutory case with some hypothetical other injunction case. Injunctions, of course, don't get issued unless there is evidence of law breaking. But the Legislature, Legislatures often identify the public safety or other public health or other problems that need to be addressed, conduct that was not previously illegal and can get made illegal by the statute.

And Hill makes clear that the First Amendment is not some unusual limitation about that, that a prophylactic approach that says that we've got a problem here, we're not going to wait until there's a physical battery and then arrest the person. The Legislature can, indeed, say we are going to in a content-neutral way clear out that buffer zone.

Also, as in McGuire, as in Hill, as in Madsen, as in these other buffer zone cases we've referred the Court to, this statute leaves open ample alternative channels of communication. Individuals may communicate in any way they wish as long as they're not doing it from inside a clearly marked and posted buffer zone during a clinic's business hours.

We gave the Court some evidence that there is lots of communication happening outside buffer zones around

clinics. Individuals holding the signs, praying, singing, chanting, walking on the sidewalk, talking to people, trying to and perhaps succeeding in handing out literature. Any way the people want to express themselves, they can do it as long as they respect the time and place restrictions of the buffer zone statute.

And, Your Honor, this statute is, this buffer zone we are dealing with today is narrower than buffer zones that have been upheld as constitutional by the Supreme Court and by the First Circuit. As I already said, it's narrower than that 100-foot buffer zone around election places that was upheld in Burson. It's much narrower than the buffer zone in Madsen that was a fixed 36-feet from the entire property line of the clinic.

And it's certainly much, much narrower than the buffer zone restriction put in place in Boston during the 2004 Democratic National Committee where protestors who wanted to actually be able to communicate with convention delegates were restricted to this heavily secured, walled-in pen underneath some railroad tracks and weren't allowed to go anywhere else near the convention area. And that was upheld as constitutional by the First Circuit in the Bl(a)ck Tea Society case.

Now, plaintiffs makes a perfectly valid and important point. The Legislature here was dealing with

public safety and security problems that were not as broad as the public safety and security problems that were of concern at the time of the Democratic Convention. But that, of course, is why the Legislature much more narrowly tailored the solution it adopted here as compared to the solution upheld in Bl(a)ck Tea where protestors were barred from much of, you know, many, many blocks around the convention and had to just stand within this fortified penned area.

Your Honor, one other point that I should just underscore, although this is in our proposed findings at paragraphs 87 to 91. Mr. Deprimo argued again this morning that somehow the Schenck case and other cases stand for the proposition that there is a constitutional right to be able to approach within a few feet of someone and converse in normal conversational tones.

Your Honor, at least in this Circuit that argument is squarely foreclosed by the First Circuit's Bl(a)ck Tea Society decision that I just discussed. The argument was expressly made that one of the reasons that the fortified pen was allegedly unconstitutional is that demonstrators wanted to be able to go up and buttonhole individual delegates and talk to them. And the court held that, "There is no constitutional requirement that demonstrators be granted that sort of particularized access."

We provide citations, Your Honor, at those paragraphs to Supreme Court holdings making clear that the First Amendment does not guarantee the right to employ every conceivable method of communication at all times and in all places.

Here if an individual wants to hand out leaflets or have close face-to-face conversations, they can do it from anywhere outside a clearly marked or posted buffer zone. They are free to approach individuals outside the buffer zone or they're free -- and there is evidence in the record that this happens -- to convince people who are inside the buffer zone to come out and talk to them.

We've presented some evidence that this continues to happen. For example, in Brookline, you look at some pictures, what they -- that might just help clarify the pictures of that parking lot with the building behind it. It's a private parking lot, not a public lot. And that's why protestors can't be in the parking lot.

But there is undisputed evidence in the record that even under the revised statute protestors can and do stand on the public sidewalk outside the buffer zone holding signs. And when individuals park in the parking lot, encourage folks to come over and talk about alternatives to abortion because there is an assumption that somebody going into the building might be there for abortion-related

services. And people do that. They go over and they talk to folks.

And so the statute does not in any way ban or bar conversations. It does not in any way ban or bar leafletting.

Just very quickly, Your Honor, and then I'll wrap up, a few more high points.

Your Honor, the third cause of action in this case is a claim that the statute is unlawful prior restraint. Bl(a)ck Tea Society again forecloses that claim.

The First Circuit citing specific parts of the Supreme Court's decisions in Hill, in Schenck and in Madsen found that the Supreme Court has explicitly rejected attempts to analyze security based time, place or manner restrictions as prior restraints. And those cases are controlling here. Just as they were controlling in Bl(a)ck Tea Society, they control this case. There is no prior restraint claim. This is a time or place regulation, not a prior restraint on speech because no speech is banned or barred.

Your Honor, in the second cause of action plaintiffs have separately pled a claim that this statute is overbroad. And in their proposed conclusions of law around paragraph 112 they articulate this as a complaint that the statute within the buffer zone limits the time or the place

of "all types of speech" and "all manner of speech."

Your Honor, here, like in Hill, the fact that the buffer zone statute applies equally to all types of speech and all manner of speech doesn't prove that it is overbroad. It merely proves that it's content-neutral.

And that was the point of the analysis in the Hill decision, 530 U.S. at 730 to 732. The Supreme Court said with respect to the buffer zone statute at issue there responding to virtually the identical argument, they said the comprehensiveness of the statute is a virtue, not a vice because it is evidence against there being a discriminatory governmental motive.

So the overbreadth claim also fails, Your Honor.

The sixth cause action is the vagueness claim which we've already discussed, Your Honor.

The equal protection claim in the eighth cause of action the plaintiffs again are attacking the particular exemption for clinic employees or agents. We have talked about why that exemption, just as the First Circuit held in McGuire, is not viewpoint discriminatory and so it goes not undermine the neutrality of the statute.

In McGuire the First Circuit held that while if the exemption passes muster in terms of viewpoint neutrality, then as a matter of law it must pass muster under the equal protection clause. And the same is true in this case, Your

Honor.

Indeed, that exemption is identical in the current statute. When the Legislature made its revisions in 2007, it changed the nature of the buffer zone but did not change at all any of the four exemptions. And so the First Circuit's holding in McGuire applies directly here.

Your Honor, with respect to the fourth cause of action on the free exercise of religion, I don't know whether Mr. Deprimo wishes to speak to it when he gets back up. If so, I might say a few words; but we've covered this in our proposed findings from around paragraphs 102 to 112. I would be happy to answer questions. But there is no cause of action that can prevail here under the free exercise of religion clause.

Very briefly, the complaint is that the statute restricts where people can pray. But the fact that somebody wants to pray right by a clinic door and instead has to pray a few feet away on the sidewalk as a matter of constitutional doctrine is not an unlawful restriction of the free exercise of religion. Instead, to use the wording the Supreme Court always comes back to, what we have here is a law that is neutral and of general applicability that has at most an incidental affect on the exercise of religion. And such a statute is permissible under the First Amendment.

The last cause of action is the seventh one, Your

Honor. The plaintiffs have made a claim that, there is reference this morning to the Supreme Court's City of Chicago versus Morales case. The plaintiffs claim that Morales gives them a constitutional right to loiter wherever they want in a public space.

That's not right, Your Honor. We show this in our proposed findings paragraphs 125 to 127. The three justice plurality in Morales has a line or two that is dicta about a right to loiter. The First Circuit has made clear in its recent decisions that -- I'm sorry. I'm confusing two things.

It is the Seventh Circuit that held in the Doe versus City of Lafayette case that the Morales dicta cannot be read as mandating that the Supreme Court established a right to loiter in all places. The Seventh Circuit in Doe affirmed a city order that banned a convicted sex offender from the city's parks.

The sex offender said, But I have the right to loiter wherever I want. The Seventh Circuit held that's not right. The city to protect public safety can restrict where you loiter.

Similarly, here, Your Honor, the fact that somebody who wants to loiter has to do it a few feet further down the sidewalk does not create some independent constitutional violation.

Your Honor, because, just to sum up, because the law is content-neutral, because the law is narrowly tailored to address the problem that's in that undisputed legislative record, because all avenues of communication are left open outside the buffer zone, the statute passes muster under that three-part test that was applied in McGuire. And it is constitutional on its face.

THE COURT: Okay. Do you want the last word? We are not going to let you reargue the whole case again. If you want to pick a point, go ahead.

MR. DEPRIMO: Yes, Your Honor, I do have a couple of comments.

First of all, let me just say that the plaintiffs are going to reurge all the arguments that are made in the briefing in support of preliminary injunction in the event that there are things I don't touch upon here.

Your Honor, it seems to --

THE COURT: What did you say you are going to do?

MR. DEPRIMO: What I said was is the plaintiffs reurge all of the arguments that are contained in their briefing in support of preliminary injunction because I will not touch upon them all here. I just want to make the record clear that we are not waiving anything.

THE COURT: Okay.

MR. DEPRIMO: Okay. Your Honor, essentially the --

THE COURT: But you are going to confine yourself to the facial analysis, not the as applied?

MR. DEPRIMO: Yes.

THE COURT: Okay. Go ahead.

MR. DEPRIMO: Your Honor, it seems to me that the government's argument is essentially, Trust us, Judge, we know what's best.

Narrow tailoring has a particular legal definition. A law is narrowly tailored if the law targets the exact evil that the law is designed to remedy. That does not -- that is not contained in the briefing by the Commonwealth. It is not mentioned in the conclusions of law by the Commonwealth. And it wasn't mentioned in oral argument today by the Commonwealth.

And the reason is is there is no way, there is no way that the government can show the Court that the regulation regulating or restricting speech in a 35-foot radius from the driveways and the entrances and exits to clinics is narrowly tailored to the exact evil that they're looking to remedy.

That is crucial --

THE COURT: What do you think that the remedy is that they are looking -- I mean, the problem that they are seeking to remedy?

MR. DEPRIMO: Well, they tell us, they tell us in

finding of fact 20 and conclusion 53. It's the problems are immediately adjacent to the driveways and the doors.

THE COURT: Those are choke points.

MR. DEPRIMO: Yes, the bottleneck as they put it.

Here's the problem with the driveways, okay. Here's a little bit of testimony in the record from abortion supporters or abortion providers --

THE COURT: Well, we are talking about public safety; right?

MR. DEPRIMO: We are talking about public safety.

THE COURT: That is their purpose.

MR. DEPRIMO: Well, that's what they claim their purpose is. And --

THE COURT: Well, they articulate that.

MR. DEPRIMO: Well, they do in this respect.

One thing that counsel said was, is because we say it's content --

THE COURT: Excuse me. And then you might touch upon it, the emergency preamble that is attached, does that have significance?

MR. DEPRIMO: Well, my thought is, Your Honor, just because they say this is content-neutral doesn't make it so. You actually have to look and see what they did.

THE COURT: What does that have to do with what I just asked you about the preamble?

MR. DEPRIMO: Well, the claim is, in the sense of the --

THE COURT: That there was an emergency. In other words, that is an emergency preamble that takes something -- I have forgotten my days in the Volpe administration but normally I think it is a 90-day period I think after something is passed that the governor signs an emergency preamble, it is immediate.

MR. DEPRIMO: Mm-hmm.

THE COURT: Usually that means that there is something serious happening.

MR. DEPRIMO: Right.

THE COURT: Is that something I can take into consideration?

MR. DEPRIMO: I think you should, Your Honor.

There is nothing that was seriously happening out there. There was nothing that happened at a particular point in time where the governor said all of a sudden we need to do emergency legislation, enact this wide buffer around abortion clinics.

I think --

THE COURT: Well, does it have to happen or can they see it coming? I mean, are they entitled to -- as a matter of fact, don't we expect them to see things coming rather than wait until an existing problem?

MR. DEPRIMO: Well, but you have to see it coming based upon facts. My point is that there is no facts in the record to support it.

One of the things that I think is really crucial with respect to the record, Your Honor, is the fact that it is only abortion providers and supporters that talk about all these problems that are around the clinics. And they don't do it with respect to facts. They make conclusory allegations. This person was blocking. This person was impeding. This person was harassing. Okay.

These people would be expected to embellish their testimony because they side with the pro choice viewpoint as opposed to those who oppose abortion.

But when we look at the objective unbiased evidence in the record, there is nothing that supports the zone. The police didn't testify that there was any problem outside the abortion clinics. They didn't say there was any impeding, any blocking, any harassment, any trespass.

The police are there all the time. That's the testimony in the record. They're there all the time and they didn't see any of the problems that these abortion providers and supporters saw.

Nothing in the record with respect to arrests and convictions. The law, that this particular law even under the new and the old version, another subsection that we

don't challenge specifically, specifically says it's illegal to block, impede, harass, trespass.

Well, if these things were happening, Judge, why aren't the people who were actually violating the law being prosecuted? And if they're being prosecuted, why are there no convictions? There are no arrests and no convictions in the record with respect to unlawful conduct.

THE COURT: All right. Wait just a second.

What do you say about that?

MR. SALINGER: Your Honor, the Legislature is not required to rely solely on the laws that make illegal particular threatening behavior by an individual. The First Circuit addressed this in McGuire I, 260 F.3d at 48 to 49. The Supreme Court addressed it in Hill and Burson.

Yes, there might be other ways that some more narrow -- more specific behavior restrictions could be applied. The analysis in McGuire I really is controlling on this point.

I think the metaphor that the First Circuit held is, you know, those laws might stop the big fish but a lot of the fingerlings will get through and you might still have had problems that need to be solved. And the First Amendment allows the Legislature to establish a clear buffer zone to keep out the fingerlings as well.

THE COURT: All right.

MR. DEPRIMO: Your Honor, what Mr. Salinger said is correct, okay.

My point is is the lack of arrests and the lack of convictions are showing that the illegal unlawful behavior isn't occurring in the first place. It is true that the government can enact other types of regulations and don't have to specifically rely upon blocking, impeding and trespass laws. We acknowledge that.

But, again, my point is the fact that people aren't being charged with these violations of law, people are not being convicted by these violations of law is evidence that the violations of law are not occurring.

Police officers are trained to distinguish between lawful and unlawful conduct. The police are seeing exactly the same things as the abortion providers and the supporters are seeing. But they're coming to two different conclusions. The abortion providers say harassment, impeding, blocking. The police officers sit and they're looking saying no, it doesn't violate the law.

That's a very significant difference. It's very important that there actually be evidence in the record to show that the unlawful conduct is a problem. And that doesn't exist in this particular case.

Restrictions on speech are fact intensive. Whether you look at Madsen or Schenck or Hill, the Court says okay,

what are the facts. Do the facts warrant the regulations that the government has imposed here.

And in this particular case, Judge, there is just nothing in the record, there is no objective evidence from law enforcement or any unbiased source that says that the problems that the abortion providers are saying are happening are actually happening.

THE COURT: Okay. I think I understand your position on that.

MR. DEPRIMO: One other position, Your Honor, is counsel said that the Court essentially should defer to the governor in determining what's best. Well, the fact of the matter is is that the reason the Court is here is to make sure that the governor doesn't overstep his bounds. That's the whole point of the time, place and manner test. That's the whole point of the careful scrutiny that the Court is required to undertake when looking at, when looking at speech restrictions.

THE COURT: I think I understand your position.

MR. DEPRIMO: Okay. Your Honor, with respect to overbreadth, again, we are talking about narrow tailoring here. And even in the context of overbreadth, the overbreadth question is this:

Does the regulation sweep within its ambit a substantial amount of constitutionally protected conduct?

Then you look at the particular ordinance and you say, okay, what's the legitimate sweep of the ordinance or the statute.

In this particular case the legitimate sweep is what? It is clearing out the bottleneck, as Mr. Salinger said, immediately adjacent to the doors and to the driveways. Certainly blocking, impeding, trespass is actually a significant interest. That's a legitimate interest of the government.

But let me ask the Court this question or ask the Court to ponder this question.

How does sign display that doesn't block the door, how does the statute target the evil that they say it's designed to remedy? Blocking, impeding and harassing. Somebody who is simply standing there with a sign. Someone who is standing there handing out leaflets --

THE COURT: Well, if the sign is right in your face, that is one problem. And the Legislature here set a boundary that is far enough back so that that wouldn't happen.

MR. DEPRIMO: Well --

THE COURT: I guessed the answer to your question.

MR. DEPRIMO: Well, again, what they said was the problem was right next to the door.

What my point is, if somebody is standing five feet away from the door with a sign, they're not blocking,

they're not impeding.

THE COURT: But then we go back to what we expect of our police officers. They are professional. What we expect from the Legislature. They don't have to have the problem at their doorstep. They are supposed to foresee ways to prevent the problem from taking our doorstep. I think that is true with all kinds of situations.

MR. DEPRIMO: Let me continue with my overbreadth argument.

Within this particular zone, okay, within a 35-foot radius of a public sidewalk, traditional public forum, quintessential forum for free speech, you can't engage in commercial speech. You can't engage in petition circulating. You can't solicit contributions. You can't panhandle. You can't labor organize. You can't labor picket. Okay. A Girl Scout can't sell her cookies. A Boy Scout can't sell newspapers. Somebody can't stand on the sidewalk to smoke a cigarette or have a cup of coffee. Somebody can't stand there on the corner waiting for a bus or a ride or a taxi.

And my question is what does that activity have to do with impeding the doors and the driveways of the clinics? Nothing. Nothing at all.

THE COURT: Well, except the answer I suppose that he would make, at least as far as the argument, that they

want to clear the way out. In other words, instead of making it a forest, they are trying to make it into an open space.

MR. DEPRIMO: Well, here's the problem then. Here's another problem. Why is that they're limiting, why is it that they're limiting regulations to abortion clinics? Why are they limiting it to clinics, not hospital abortion clinics? It doesn't apply to health care facilities generally. It doesn't apply to the grocery store. It doesn't apply to the shoe store or the regular office building. All of these -- the problems that they're talking about here --

THE COURT: I don't know the answer to it but I take it that as far back as the McGuire case, McGuire I I think is what it is called, that is where the problem was. That is where the facts indicated that a remedy was necessary. You know, not at a Stop & Shop or some other type of retail facility.

MR. DEPRIMO: But my point is, Judge, is that there is nothing in the record anywhere that commercial speech or charitable solicitations or petition circulating or entertainment or just general conversation causes any of the problems that the government is seeking to remedy.

THE COURT: No, but I think the government has the right to neutralize a certain amount of property. The fact

that it is a public sidewalk doesn't mean that you can be an unlicensed musician or something like that. I presume you need -- you can't set up a stand and start to sell something on a public sidewalk without getting licensed by someone, by some city official.

MR. DEPRIMO: Well, that's true. And I think that's a little bit -- that is not the issue that I am trying to bring --

THE COURT: No, I understand. But, I mean, the fact that this includes, this includes a ban on Boy Scout cookies or Girl Scout cookies as well as what we are talking about here argues that it is content-neutral. Doesn't it? The more breadth it has, the more content-neutral it is.

MR. DEPRIMO: Content-neutrality though is not an issue when you are talking about overbreadth. Content-neutrality is an issue when you are talking about time, place and manner.

THE COURT: Okay. You can only take it a bite at a time. You gave us seven interesting bites here so.

(Laughter.)

MR. DEPRIMO: Well, the point, the whole point that I was trying to make, Judge, is that the government has a particular legitimate interest. And the legitimate interest that they have articulated here is they want to stop the bottleneck at a particular precise point.

THE COURT: And the issue is how far back can they go to stop the bottleneck? Are they limited to 12 feet, 15 feet or is 35 feet okay? I mean, that is basically it.

MR. DEPRIMO: Well, yes. Essentially that is it.

THE COURT: Okay.

MR. DEPRIMO: And the government is saying, you know, we can do 35 feet. And, you know, what if they said 500 feet or a mile?

THE COURT: They didn't.

MR. DEPRIMO: They didn't. That's right. But the question becomes where is the line.

THE COURT: Maybe I would have an easier case if they did that.

(Laughter.)

THE COURT: All right.

MR. DEPRIMO: Yes, Your Honor. Thank you.

THE COURT: Okay. Anything else? Is that it?

MR. SALINGER: No, Your Honor.

THE COURT: All right. Thank you both, very fine arguments that lived up to what I expected from reading your briefs.

I will do the best I can with it and we will take it under advisement. Okay.

MR. DEPRIMO: Your Honor, there is one other thing. Plaintiffs would renew their motion for preliminary

injunction. The plaintiffs do believe that they showed the Court they have a significant likelihood of success on the merits and I think --

THE COURT: All right. We will consider it open.

MR. DEPRIMO: One other thing, Your Honor, too is that the plaintiffs would move the Court to stay discovery pending the Court's ruling on this case.

THE COURT: I thought we already did.

MR. DEPRIMO: I thought what the Court did was stay discovery pending this hearing. But I would like to stay discovery pending the Court's resolution of the --

THE COURT: I would like that too. Then I won't feel so rushed. But I will try to make it a priority item anyway. We will consider -- any objection to that?

MR. SALINGER: No objection, Your Honor.

THE COURT: Okay. Discovery can be stayed pending the issuance of an opinion here.

MR. DEPRIMO: Thank you.

THE COURT: All right. Thank you very much, everybody.

THE CLERK: Court is in recess.

(WHEREUPON, the proceedings were recessed at 11:45 a.m.)

C E R T I F I C A T E

I, Carol Lynn Scott, Official Court Reporter for the United States District Court for the District of Massachusetts, do hereby certify that the foregoing pages are a true and accurate transcription of my shorthand notes taken in the aforementioned matter to the best of my skill and ability.

/S/CAROL LYNN SCOTT

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